In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 231

COWELL PORTLAND CEMENT COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI

Respondent, National Labor Relations Board, has filed herein its Brief in opposition to the Petition for Writ of Certiorari. We shall reply to said Brief under the same points as appear in our Brief in Support of the Petition.

Point A

The United States Circuit Court of Appeals erred in holding that the Board had jurisdiction in a case in which the Board's findings affirmatively declared that the employer is not engaged in commerce (as defined in the Act) and in which there is neither finding nor evidence that the employer's acts burden or obstruct the commerce of anyone else.

In our Brief, relying on *United Corporation v. Federal Trade Commission*, 110 Fed. (2d) 473, and *Chamber of Commerce of Minneapolis v. Federal Trade Commission*, 13 Fed. (2d) 673, and the cases cited by the Court in the *United Corporation* case, we submitted that the jurisdiction of the National Labor Relations Board must be decided on the facts as they existed at the time when the Board rendered its decision. As petitioner had withdrawn from all interstate commerce, both outgoing and incoming, more than two years before the Board made its decision (April 18, 1942), and as there was no finding of fact showing that petitioner's acts in any way burdened or obstructed the interstate commerce of anyone else, we submitted that the Board was without jurisdiction over petitioner and that its decision is null and void (Brief, pp. 14-29).

We then submitted that if it be held that the determinative facts are those which existed at the time *when the Board filed its complaint**, namely, May 11, 1940, the Board

(a) Because petitioner has at no time on or after March 1, 1940, been engaged *in* commerce (i.e., interstate commerce); and

(b) Because there was no evidence and no finding of fact by the Board that petitioner, not being so engaged, nevertheless by its acts burdens or obstructs

* Note: Unless otherwise stated, all italics in this brief are ours.

was likewise without jurisdiction

the interstate activities *of other businesses,* and the Act has not vested the Circuit Court of Appeals with power to supply findings of fact which the Board did not make.

We shall now consider respondent's argument in opposition, the pages being those of respondent's brief.

Page 11

At page 11 of its brief, respondent incorrectly states the petitioner's "subsidiary question" under the head of jurisdiction, which question our petition states as follows (Brief, p. 5):

> "In the case of an administrative tribunal such as the National Labor Relations Board, is the tribunal's jurisdiction to be determined on the facts which exist *at the time when the tribunal renders its decision* or *at the time when the complaint before the tribunal was filed?*"

Respondent (Brief, p. 11) states the question as though it related only to the time when the tribunal renders its decision and eliminates the alternative time *when the complaint before the tribunal was filed.*

Pages 11-12

At pages 11-12 of its brief, respondent states that on the *facts* as found by the Board, the question in our Point A does not arise. We shall show hereinafter that this contention is not tenable.

Page 12

At page 12 of its brief, respondent refers to the Board's "finding" that petitioner's discontinuance of transactions

in interstate commerce was effected "in order to avoid the consequences of its prior violation of the Act." This statement is at complete variance with all the evidence in the record on that subject.

The record shows, without any contradiction, that the sales of cement by Henry Cowell Lime and Cement Co. to points outside the State of California diminished rapidly in the years preceding 1940 (Cowell Exh. 7, 9, 11; R. 2140, 2145, 2150); that Mr. Ralph B. Mitchell, the Company's Sales Manager and Traffic Manager, repeatedly spoke to various directors and officers of the Company concerning the diminishing interstate cement sales, drew attention to the fact that said interstate business was very unprofitable and recommended that the Company get out of that business and confine its sales efforts to more remunerative territory in California (Mitchell, R. 3095-7, 3114-25); that in the early part of December, 1939, Mr. Mitchell again broached the subject to Mr. Thelen, the Company's counsel and a member of its board of directors and again recommended that the Company get out of the small remaining interstate business, whereupon Mr. Thelen asked Mr. Mitchell to prepare a statement showing the financial results of the Company's interstate sales of cement (Mitchell, R. 3095-7); that Mr. Mitchell thereupon wrote a letter, dated December 11, 1939, to the board of directors (Board Exh. 86, R. 2204-5) showing all interstate shipments of cement from January 1, 1938, to November 30, 1939, together with the financial results of said sales, showing a total net profit from the 1938 interstate sales of only 11 cents per barrel of cement and from the 1939 sales of only 3 cents per barrel; that Mr. Mitchell's letter was consid-

ered by the board of directors at a meeting held on December 19, 1939, and that the board thereupon adopted a resolution declaring that it will be the definite policy of the Company to confine its sales of cement, on and after January 1, 1940, to points within the State of California (Cowell Exh. 6, R. 2126-7; Board Exh. 85, R. 2201-4); that the board of directors of petitioner adopted a similar resolution relating to the purchase of materials and supplies (Cowell Exh. 5, R. 1930; Board Exh. 84, R. 2199-2201); and that copies of said resolutions were transmitted to the appropriate officers and employees, with instructions to comply with them, and that said resolutions, ever since January 1, 1940, have been in full force and effect (Mitchell, R. 2127; Barnett, R. 1928; Boyle, R. 3573-4).

Not one of the transcript references cited by respondent in its brief (p. 12) supports the Board's above "finding". The Board made this same claim before the Circuit Court of Appeals, which ignored the contention.

As Circuit Judge Hutcheson of the Fifth Circuit said, in *Magnolia Petroleum Co. v. National Labor Relations Board*, 112 Fed. (2d) 545, speaking of the Board's similar "findings" in that case (p. 552):

> "We think it plain that the findings in this case are based on nothing but *suspicion, surmise* and *conjecture;* that they are wholly unsupported by the evidence and that they and the order based on them cannot stand."

Pages 12-13

At pages 12-13 of its brief, respondent states that the Board found that at the time of the hearing before the Trial Examiner, in June, 1940, petitioner was still engag-

ing in substantial transactions affecting interstate commerce. Conceding that petitioner, during the first six months in 1940, made no sales of cement in interstate commerce, respondent points to materials and supplies worth $21,214.00 which originated outside of California and which moved to Cowell "during the first six months of 1940".

We shall now draw the Court's attention to the *facts* with reference to these claims.

Said sum of $21,214.00 consists of the following items:

(a) Two groups of items, amounts $3,885.00 and $951.00, total $4,836.00, which were produced or manufactured out of California but had become part of the local stocks of California dealers and were thereafter shipped from those stocks for delivery to Cowell.

The Board expressly found as a fact that these items were so shipped from California stocks (R. 494: see also Board's Exhibits 113(a) and (b), R. 3513, 3517) and further found that subsequent to February, 1940, there have been *no interstate shipments to Cowell* (R. 494).

The interstate movements in each of these cases had obviously ended when delivery was made to the seller in California and the subsequent movement to Cowell was intrastate. *

(b) Items totaling $16,378.00, weighing 313,384 pounds and consisting of 7 shipments purchased in 1939.

These are the items on which the Board principally relies in support of its claim to jurisdiction.

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* During this same period of time, materials, supplies and equipment produced or manufactured in California and worth $95,699.73 were shipped to Cowell (Board Exch. 113(c), R. 3522-38).

However, the testimony and the Board's own finding of fact show that the last of these shipments arrived at Cowell in February, 1940 and that there have been no interstate shipments to Cowell on and after March 1, 1940. The Board's own Exhibit 70 shows that all of these items arrived at Cowell during the months of January and February, 1940 (R. 2024).

Mr. Ralph B. Mitchell, Traffic Manager of Bay Point and Clayton Railroad Company, over whose line of railroad the materials and supplies moved to the cement plant at Cowell, testified that he had examined each and every freight bill during the period from January 1 to and including June 30, 1940, and that, apart from the above 7 shipments which were delivered at Cowell in January and February, 1940, he found not a single shipment which moved to Cowell from any point of origin outside the State of California (R. 3085-6). There were 492 of these freight bills, as shown on Cowell Exhibit No. 54 (R. 3088).

Mr. Mitchell also examined each receipted invoice of petitioner during the same period and testified that apart from the receipts covering the above 7 shipments said receipted invoices show no instance of any item which moved on or after January 1, 1940, to petitioner at Cowell from any point outside the State of California (R. 3088-9).

Mr. E. D. Barnett, petitioner's superintendent at Cowell, testified that he, too, had examined each of said receipted invoices and that, apart from said 7 shipments, the invoices show no shipment to Cowell, either carload or less-than-carload, after January 1, 1940 from any point outside of California (R. 2086-8).

Mr. Charles A. Graham was a field examiner of the National Labor Relations Board. He examined the records

of petitioner and of Bay Point and Clayton Railroad Company relating to all shipments of freight to and from Cowell and prepared exhibits which were introduced in evidence. Mr. Graham was not available for cross-examination as to an exhibit covering the period from January 1 to June 15, 1940, but counsel for the Board stipulated as follows (R. 3565):

> *"That if Mr. Graham were here as a witness he would testify that in his examination of the records at No. 2 Market Street, San Francisco, he found no instance of shipments of machinery, supplies and equipment originating in points outside the State of California to Cowell Portland Cement Company for the year 1940, other than those shown in the second column of Exhibit 116(b)."*

The items shown in the second column of said Exhibit 116(b) were the 7 shipments hereinbefore referred to.

Now we come to the Board's own finding of fact on this issue. On page 494 of the Record, after referring to said 7 shipments which were received at Cowell "in January and February, 1940", the Board made the following finding of fact:

> "The records of the B. P. & C. disclose *no interstate shipments thereafter* . . ."

However, *the Board's complaint was not filed until May 11, 1940.*

Thus it appears on the basis of the uncontradicted testimony and the Board's own finding of fact that all interstate shipments of petitioner, outgoing and incoming, had been completely terminated before the Board's complaint was filed. Obviously, the Board's claim to jurisdiction over

petitioner could not be justified by any claim that petitioner was engaged *in* interstate commerce.

Page 13

At page 13 of its brief, respondent says:

> "On these facts the Board concluded that petitioner's operations 'still have a close, intimate and substantial relation to' interstate commerce (R. 497)."

This is an inaccurate and misleading statement. What the Board actually found is as follows (R. 497):

> "Moreover, *the interstate shipments incident to the respondent's business which occurred in 1940* show that the respondent's operations still have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and therefore that the Act is applicable to it."

Here we have the basis of the Board's claim to jurisdiction. The Board relies on the "interstate shipments" which occurred in 1940. These are the 7 shipments above referred to, which were delivered at Cowell in January and February, 1940. The Board itself found that there were no interstate shipments after that time.

When the Board filed its complaint, two months and eleven days later, petitioner's interstate transactions had completely terminated and the Board was without jurisdiction over petitioner.

Page 14

On that state of the record, the court obviously could not sustain the Board's jurisdiction on any finding that petitioner was engaged *in* interstate commerce.

Assuming that respondent (petitioner herein) was not engaged *in* commerce after March 1, 1940 (148 Fed. (2d)

237, 241; R. 3676-77) and bearing in mind that the complaint was not filed until May 11, 1940, the court evolved a theory that the Board's jurisdiction could be upheld on another ground, namely, that petitioner's business burdened or obstructed some one else's interstate commerce. On that point, respondent's brief (p. 14) says that the Board found "also that its (petitioner's) activities burdened commerce (R. 497)". Turning to R. 497, we find that what is there said is based on Section IV of the Board's decision which reads as follows (R. 490):

> "We find that the activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce."

This is obviously only a general *conclusion* and *not* a *finding of fact.*

What commerce and *whose* commerce is claimed to be affected? The Board does not say.

As Justices Black, Douglas and Murphy pointed out in their concurring opinion in *Polish National Alliance v. National Labor Relations Board,* 322 U.S. 643 (see our Brief in Support of Petition, pp. 14-16), there are two broad classes of cases in which the National Labor Relations Board has jurisdiction over an employer, namely,

> (a) Where the employer is engaged *in* interstate commerce; and
>
> (b) Where the employer is not so engaged but his acts burden or obstruct the interstate commerce of *some one else's business.*

And if the Board's jurisdiction is to be sustained under (b), it is incumbent upon the Board to make *findings of fact* showing who that third party is and what interstate business of his will be burdened or obstructed.

The Board has completely failed to make any such finding of fact in the present case and the Circuit Court of Appeals has no authority to supply the findings which the Board did not make (see our Brief in Support of Petition, pp. 21-2).

Pages 14-15

Finally, on the issue of jurisdiction, respondent, at pages 14-15 of its brief, says:

> "Inasmuch as the court below did not decide whether the Board's jurisdiction was to be determined as of the time of the issuance of the complaint or as of the time of the Board's decision, the issue petitioner seeks to raise is not presented and the decision below in no sense conflicts with *United Corporation v. Federal Trade Commission*, 110 F. 2d 473, 476 (C.C.A. 4) and *Chamber of Commerce of Minneapolis v. Federal Trade Commission*, 13 F. 2d 673, 685 (C.C.A. 8)."

We find ourselves unable to agree with this contention.

As we read the court's decision, the court held that the issue of jurisdiction is to be decided on the facts existing at the time when the Board's complaint was filed, on May 11, 1940 (148 Fed. (2d) 237, 241; R. 3676).

As to the second of the above two alternative times, we understand the court to have ruled adversely, on the ground that the *United Corporation* case and the *Chamber of Commerce of Minneapolis* case, on which we relied,

were not in point because the administrative tribunal there involved was the Federal Trade Commission and not the National Labor Relations Board.

While we read these cases as having been decided on broad principles of administrative law and find nothing therein indicating that it was intended to limit their effect to situations arising under the Federal Trade Commission Act, we cannot escape the conclusion that the court ruled against us on this issue and that respondent's statement to the contrary is not well founded.

In concluding on the issue of jurisdiction, our views may be stated, in a nutshell, as follows:

1. The court below erred in holding that the issue of the Board's jurisdiction over petitioner was not to be determined on the facts existing at the time of the Board's decision.

2. At the time when the Board rendered its decision (April 18, 1942) petitioner had for more than two years completely terminated all interstate transactions, both outgoing and incoming, and was not subject to the Board's jurisdiction.

3. If it be held that the Board's jurisdiction is to be determined on the facts which existed at the time the Board filed its complaint (May 11, 1940) it is likewise evident that the Board was without jurisdiction,

(a) Because petitioner has at no time on or after March 1, 1940, been engaged in commerce (i.e., interstate commerce); and

(b) Because the Board made *no finding of fact* that petitioner, not being so engaged, nevertheless by its acts was burdening or obstructing the interstate com-

merce activities *of any third party*, and the court below was without authority to supply the findings of fact which the Board did not make.

Point B

The United States Circuit Court of Appeals erred in holding that, in the case of an unfair labor practice, the Board may award back pay to a striking employee for the time during which he was on strike, even though there has been no request for reinstatement.

As we pointed out in our Brief in Support of the Petition (pp. 29-30), the following facts are material in this connection:

1. The strike declared by the C.I.O. Union on July 17, 1937, has never been revoked and is still in effect.
2. The C.I.O. Union has never made request for reinstatement of its members; and
3. Every individual member of the C.I.O. Union who has ever made request for reinstatement has been re-employed.

We may add that there are over 60 men who have been so reinstated. Their names and work records appear in Cowell Exhibit 45a (R. 3397-3420).

Respondent, in its brief, does not challenge any of these facts, all of which are uncontradicted on the record.

Respondent's brief (pp. 15-16) also concedes the well-established rule that, even though a strike is caused by an unfair labor practice of the employer, back pay will not be awarded to a striking employee for the period of his strike up to the time when he requests reinstatement.

As we point out in our Brief in Support of the Petition (p. 30), the reason underlying this rule is that, even though the strike has been caused by an unfair labor practice of the employer, such as the discriminatory discharge of employees, *a striking employee cannot, at one and the same time, both strike and receive back pay for the period of the strike.*

However, respondent claims (Brief, p. 16) that there is an *exception* to this rule where the employer has announced that he will reinstate a striking employee but only on an illegal condition, such as that he shall join a union not of his choice.

In support of that claim, respondent (Brief, pp. 16-17) lists a number of court cases. However, an examination of these cases reveals that not one of them supports respondent's claim.

In *Idaho Potato Growers, Inc. v. National Labor Relations Board,* 144 Fed. (2d) 295, and *Subin v. National Labor Relations Board,* 112 Fed. (2d) 326, there was not even a strike. Obviously, these cases are not in point.

In *National Labor Relations Board v. A. Sartorius & Co.,* 140 Fed. (2d) 203, the decision contains not a word about back pay.

In *National Labor Relations Board v. Reed & Prince Mfg. Co.,* 118 Fed. (2d) 874, 887, 888, the court affirmed an award of back pay from the date of the employer's refusal to reinstate, after request of the striking employees for reinstatement. That action was in accordance with the well-established rule on which we rely.

Neither in *National Labor Relations Board v. Carlisle Lumber Co.,* 94 Fed. (2d) 138, 99 Fed. (2d) 533, nor in

National Labor Relations Board v. Sunshine Mining Co., 110 Fed. (2d) 780, does the court discuss the question whether application by a striking employee for reinstatement is necessary in order to initiate the running of back pay. In the latter case, the court does consider the question whether, on the facts of that case, it was necessary for the striking employees to make application to get their jobs back (i.e., reinstatement) but that is an entirely different matter from *back pay.* That subject is not discussed.

The only remaining case in the group cited by respondent is *Eagle-Picher Mining & Smelting Co. v. National Labor Relations Board,* 119 Fed. (2d) 903. While it is true that the Board in that case awarded back pay to striking employees without requiring them to make application for reinstatement, the case is not in point here, because of vital differences in *evidence* and in the Board's *findings of fact.*

In the *Eagle-Picher* case, 200 striking employees took the stand and testified that it was their understanding that if they returned to work it would be necessary for them to join an employer-fostered union which was not of their choice (16 N.L.R.B. 727, 800). Based on that testimony, the Board made its finding of fact that, with certain exceptions not here relevant, "the claimants were at all times after July 5, 1935, willing to return to work in the absence of illegal conditions" (16 N.L.R.B. 727, 812). The court sustained the Board's order on the basis of that evidence and that finding (119 Fed. (2d) 903, 914, 915).

In the present case, on the other hand, *not a single striking employee took the stand and testified on this subject* and *the Board, having no evidence, could make no finding.*

We submit that the *Eagle-Picher* case has no application to the record in our case.

As respondent is relying on a claimed exception to a well-established rule, it is incumbent on respondent to show clearly the existence of the exception and its application to the record in our case. As the result of a very careful examination of the authorities, we submit that there is no court case which establishes such an exception and holds it applicable to a record such as that now before this Court.

Finally, respondent claims (Brief, pp. 17-18) that there is or should be a further exception to the rule, where a lockout is followed by a strike. In support of this claim, respondent cites *National Labor Relations Board v. Long Lake Lumber Company,* 138 Fed. (2d) 363. However, that case was decided on an entirely different issue. At page 364, the court said:

> "That single complaint is that the Board's order should have been directed against Robinson alone, it being contended that Robinson was an independent contractor and the sole employer of the men affected."

On that sole issue, the court held that the record warranted the Board's treatment of Robinson and the Lumber Company as joint employers (p. 364).

There was no issue before the court on the subject of back pay and the decision does not even once refer to the matter.

However, when we turn to the Board's decision in this case, *In re Long Lake Lumber Company,* 34 N.L.R.B. 700, an interesting situation is revealed.

The Board's decision shows that on June 7, 1939, the employer shut down his logging camp in the State of Washington under circumstances which the Board found to be a lockout (p. 707); that thereafter, on the same day, the C.I.O. Union voted to strike and established a picket line (p. 707); that on July 11, 1939, the employer came to the picket line with several men who wanted to work and made to all the strikers an offer of reinstatement which was coupled with an unlawful refusal to deal with the Union and that the strikers refused the offer because of the unlawful condition and prevented the employer from opening up (p. 709); and that within a few days thereafter, the employer reopened the camp with another crew (p. 709).

On the subject of back pay, the Board held that on the first day (June 7, 1939) "the lock-out was in existence and the strike had no effect on the situation" (p. 718). Continuing, the Board said (p. 718):

> "The strike became effective only when the respondents attempted to reopen the camp to resume operations on July 11, 1939, indicated that jobs were available for the employees, *but the respondents were prevented from so doing because of the Union picket line.*"

The Board thereupon awarded back pay to each of the strikers but only of "a sum of money equal to the amount he would normally have earned as wages *from June 7, 1939 to July 11, 1939,* less his net earnings during said period" (p. 719).

In other words, the Board awarded back pay for only the period during which it found the strike to have been ineffective. However, there having been no request for reinstatement, the Board did not award back pay for any

portion of the time, beginning on July 12, 1939, during which the strike was effective. The Board reached this conclusion notwithstanding the unlawful condition which was attached to the offer of reinstatement made by the employer on July 11, 1939.

Applying the Board's decision to the facts of the present case, we find the following situation:

The shutdown of July 16, 1937, was found by the Board to be a lockout. On July 17, the Union declared a strike. On July 18, the Union established a picket line which was maintained for many months. On July 19, petitioner's general manager desired to reopen the packing house for the packing and shipping of cement (George, R. 1280) but on that day he learned that the Union had established a picket line around the cement plant and had prevented the milkman, the baker and the vegetable man from taking food and drink to the people of Cowell. Thereupon, he decided that, in order to avoid physical violence, he would defer the reopening of the packing house (George, R. 1282-5).

In other words, the general manager was prevented from reopening the cement plant because of the Union picket line. Under the Board's reasoning in the *Long Lake Lumber Company* case, the strike became effective at that time, and no back pay can be awarded for any subsequent period while the strike remains in effect, in the absence of request for reinstatement.

As far as we know, no court has ever held that a strike accompanied by an effective picket line is ineffective merely because of a concurrent lockout.

As the strike declared by the C.I.O. Union on July 17, 1939, has never been revoked and is still in effect, and as

the Union has never made request for reinstatement of its members, and as each individual member of the Union who has ever made request for reinstatement has been re-employed, we respectfully submit that the Board's back pay order should be denied enforcement.

Point C

The United States Circuit Court of Appeals erred in holding that back pay may be awarded for the period of time during which the employees unreasonably delay the filing with the Board of a proper charge.

In our Brief in Support of the Petition (p. 35), we pointed out that it was not until May 8, 1940, that the C.I.O. Union finally filed charges containing the necessary allegations with reference to the existence of the A. F. of L. Union and of its contract with the petitioner herein.

After drawing attention to the well-known fact that the Board's complaints are based on charges filed by complaining employees and that until proper charges are filed a proper complaint does not issue, we pointed out that the long delays prior to May 8, 1940, are the responsibility of the C.I.O. Union and that, for that reason, back pay should not, in any event, run back further than May 8, 1940 (pp. 35-6).

In seeking to meet that situation, respondent in its brief (p. 19), first draws attention to the fact that the original charge was filed on July 17, 1937, and that the A. F. of L. contract was not executed until "some time later" (August 27, 1937). The suggestion is made that the charge, consequently, could not have referred to the contract. How-

ever, respondent did not draw the Court's attention to the fact that the amended complaint, on which the first case was tried, was based *on an amended charge* (Bd. Exh. 1-g *which was filed on October 2, 1937,* more than a month after petitioner had entered into the contract of August 27, 1937, with the A. F. of L. Union. Had the C.I.O. Union chosen to do so, it could easily have set forth in said amended charge the facts which the Circuit Court of Appeals found should have been alleged *(National Labor Relations Board v. Cowell Portland Cement Company,* 108 Fed. (2d) 198).

Respondent's brief (p. 19) next states that this is plainly not a case in which delay in filing charges "lulled the employer into failure to reinstate" and alleges that that was the case of *National Labor Relations Board v. Mall Tool Co.,* 119 Fed. (2d) 700, 702, 704 on which we rely as stating the applicable rule.

However, this is putting up a straw man to knock him down. We have never claimed that the basis of the rule is that delay of the Union to file proper charges may lull the employer into failure to reinstate. Also, the court in the *Mall Tool Co.* case said nothing whatever on that subject. What the cout did say was (p. 702):

> "It is obvious that undue delay in filing charges may not only prejudice the employer but *also tend to encourage employees to await in idleness with the expectation that no matter how long they delay filing charges, they will receive compensation for all time during which they have been quiescent.*"

In conclusion on this point, the court said (p. 702):

> "The legislation contemplates that a proceeding such as this shall promote the public welfare; not

that it shall benefit private parties in respects unrelated to that welfare."

Finally, at page 20, respondent's brief takes the position that the fault for the long delays in the present case lies with the Board. That is a safe position for respondent to take, because of the well-established principle that the sins of the Board will not be visited upon the employees. However, the claim overlooks the fact that the initial and underlying fault was that of the Union in failing, until May 8, 1940, to file a proper charge.

Without a proper charge, there could be no proper complaint: and it is the employees who must shoulder the responsibility for the delays until a proper charge was filed.

It will be understood, of course, that we urge our Point C only in the event that the Court should not agree with us as to our Point B. We believe that Point B is sound and should dispose of the back pay issue.

Point D

The United States Circuit Court of Appeals erred in holding that, in a case in which the employee has received other regular and substantially equivalent employment, the Board may direct reinstatement, without any finding of fact showing that the effectuation of the policies of the Act require such reinstatement.

In *Phelps Dodge Corporation v. National Labor Relations Board*, 313 U.S. 177, it appeared that the Board had found that "the effectuation of the policies of the Act patently requires" the restoration of the strikers to their status quo, irrespective of whether they had secured other regular and substantially equivalent employment and also

that the employer should take affirmative action "designed to effectuate the policies of the Act" (p. 203) and had ordered the employer to take affirmative action (including reinstatement) "which the Board finds will effectuate the policies of the act" (p. 204).

However, the Court, in the majority decision, held that these conclusions were not sufficient and ordered the case remanded.

In so holding, the Court pointed out that the remedy does not automatically flow from the Act itself (p. 193) and that it is not mechanically compelled by the Act (p. 198). The Court said that "we have no warrant for speculating on *matters of fact* the determination of which Congress has entrusted to the Board" (pp. 195-196). We understand the Court to hold that before the Board can make the challenged order, it must make adequate findings of fact on which it may base a conclusion that the order will effectuate the policies of the Act.

In the present case, the Board merely said (R. 507):

> "We find that such remedial order is necessary to assure effectively the right of self-organization to the respondent's employees and thus effectuate the policies of the Act.[79]"

Footnote No. 79 merely cites, without comment, *Matter of Ford Motor Company,* 31 N.L.R.B. 994, and a court case which is clearly irrelevant.

The Board thus used substantially the same language which this Court in the *Phelps Dodge Corporation* case found to be inadequate and insufficient.

Furthermore, *there was in the present case no evidence whatever concerning the obtaining of equivalent employ-*

ment. All such evidence was expressly deferred by reason of a stipulation (R. 507, 1891-2).

Hence, there being *no evidence,* the Board could make *no findings of fact* on that issue.

At page 21 of its brief, petitioner urges that it will be a sufficient compliance with the Court's decision in the *Phelps Dodge Corporaton* case, if the Board in some case, such as the *Ford Motor Company* case, sets forth the reasoning in support of a general policy in the matter and then, in subsequent cases, merely states a conclusion, *without any reference to the facts of that case,* and with a mere footnote citation of the case which contains said reasoning. We do not so understand this Court's decision.

At page 21 of its brief, respondent states that it is this petitioner's contention that the Board is required "to restate fully the *reasoning* behind its determination in every case." It is our contention that it is the Board's duty to find and state the facts bearing on that issue. Then can follow a conclusion which, we believe, will be upheld if it follows the facts, without any elaborate statement of reasoning.

At page 21 of its brief, respondent further states that an argument similar to that of petitioner was rejected by the Court in *Republic Aviation Corporation v. National Labor Relations Board,* No. 226, 1944 Term, decided April 23, 1945. We have read this case carefully and have been unable to find therein any reference whatever to the matter of securing regular and substantially equivalent employment.

While there are a number of decisions of United States Circuit Courts of Appeals which seem to support the re-

spondent's position on this issue, we believe that they arise from a misconception of what this Court decided in the *Phelps Dodge Corporation* case, and that it would be appropriate for the Court to advise the bench and bar, in the present proceeding, of the effect of that case, particularly where the record contains no evidence whatever and no finding of fact in support of the Board's conclusion.

It is respectfully submitted that the writ should issue.

Dated: San Francisco, California,
September 18, 1945.

MAX THELEN,
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